STATE OF MICHIGAN

COURT OF APPEALS

HARRY E. POWELL, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED May 4, 2010
v	No. 289214 Genesee Circuit Court
CHARTER TOWNSHIP OF MONTROSE, Defendant-Appellee/Cross-Appellant.	LC No. 08-087975-CK

Before: M.J. KELLY, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition. We affirm.

I.

This case arises out of an agreement between plaintiff and Nextel Communications ("Nextel") to construct a wireless tower on plaintiff's property. Under the agreement, Nextel would have leased plaintiff's property for a five-year term, and would have had the option at the end of the five-year term to either cancel the lease or renew it for successive five-year periods, for a total of 30 years. Defendant interfered with plaintiff's efforts to obtain a building permit for the tower and simultaneously adopted a new ordinance that allowed defendant first priority over plaintiff for the construction of a tower.[1] Defendant subsequently entered into a lease

[1] Charter Township of Montrose, § 153.365 provides in relevant part:

(4) Communication towers are allowed under prioritized locations:

(a) First:
1. Co-location; and
2. Township property.

(b) Second:
1. Industrial; and
2. Commercial.

(continued…)

agreement with Nextel that was substantially similar to the agreement between plaintiff and Nextel. Plaintiff initiated an action against defendant for tortious interference with plaintiff's advantageous business relationship or expectancy with Nextel. During trial, defendant moved for partial directed verdict on the issue of damages, on the basis that the jury could not award damages for the five-year renewal periods without speculating as to whether Nextel would exercise its options to renew the lease agreement. The trial court granted defendant's motion, concluding that there was no evidence to indicate whether Nextel would have renewed or canceled the lease at the end of the first five-year term. Thereafter, the jury found in favor of plaintiff and awarded $83,367.75 in damages against defendant.

Nextel renewed its lease with defendant when the first five-year term of the contract ended, and plaintiff initiated a second action against defendant claiming damages. The trial court entered an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), finding that plaintiff's second action was barred by res judicata. The trial court noted that in the first action, it had already ruled that plaintiff's claim for damages arising from defendant's alleged tortious interference with the second five year term of plaintiff's contract with Nextel was not proved with sufficient evidence, and that therefore the claim was speculative. This appeal followed.

II.

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition on the basis of res judicata. We disagree. This Court reviews de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(7) and the applicability of the doctrine of res judicata. *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001).

> "In general, res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action is identical to that essential to a prior action. The purposes of res judicata are to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication. Res judicata requires that (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies. The burden of establishing the applicability of res judicata is on the party asserting the doctrine." [*Richards v Tibaldi*, 272 Mich App 522, 530-531; 726 NW2d 770 (2006) (internal citations omitted); see also *Washington v Sinai Hospital of Greater Detroit*, 478 Mich 412; 733 NW2d 755 (2007).]

(…continued)

(c) Third:
   1. Agriculture;
   2. Residential farm; and
   3. Residential suburban.

"The test for determining whether two claims are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two claims." *Huggett v Department of Natural Resources*, 232 Mich App 188, 198; 590 NW2d 747 (1998).

Clearly, the actions at issue here involve the same parties. *Richards*, 272 Mich App at 530-531. The first and second elements of res judicata are also satisfied because the trial court's order granting defendant's motion for directed verdict was a final decision on the merits. See *Latimer v William Mueller & Son, Inc*, 149 Mich App 620, 641; 386 NW2d 618 (1986) (a directed verdict is a judgment on the merits of an issue actually litigated). Plaintiff failed to appeal the directed verdict that there was insufficient evidence regarding whether Nextel would have renewed the contract with plaintiff. *SS Aircraft Co v Piper Aircraft Corp*, 159 Mich App 389, 393; 406 NW2d 304 (1987) (the "decision of a court having jurisdiction is final when not appealed and cannot be collaterally attacked."). Moreover, nearly a year after the directed verdict, the court reaffirmed its decision when plaintiff filed a motion to clarify the record. "To be accorded the conclusive effect of res judicata, 'the judgment must ordinarily be a firm and stable one, the last word of the rendering court. . . .'" *Ind Ins Co v Auto-Owners Ins Co*, 260 Mich App 662, 671 n 8; 680 NW2d 466 (2004), quoting *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 381; 521 NW2d 531 (1994).

The third element of res judicata is satisfied because the matter contested in the second action was resolved in the previous litigation. As we explained above, at trial and in the motion to clarify the record, plaintiff argued that he was entitled to damages for the subsequent five-year renewal periods, which Nextel had the option to accept or decline under the agreement. The trial court rejected this argument because plaintiff could not prove, but could only conjecture, that Nextel would renew the lease with him at the end of the five-year term. Therefore, damages for any subsequent renewal periods would be purely speculative. Pursuant to plaintiff's motion to clarify the record, the trial court ruled that any future lawsuits by plaintiff for damages could not "piggy-back off of th[e previous] case," in which damages were limited to those suffered by interference with the five-year lease. In the second action, however, plaintiff does not allege that there was a new contract negotiated between himself and Nextel with which defendant interfered. Rather, plaintiff relies on the previous allegations that defendant obstructed his construction of the wireless tower and gained priority in constructing the tower, and plaintiff asserts a claim for tortious interference of the same contract for which defendant was already found liable. Because the elements of res judicata are satisfied, the trial court did not err when it concluded that plaintiff's second action was barred.

We note that plaintiff cites, inter alia, *Arnone v Chrysler Corp*, 6 Mich App 224, 228-229; 148 NW2d 902 (1967), for the proposition that, when a divisible contract is breached, a "plaintiff can maintain an action on any deficiency when it accrues." Despite new evidence that Nextel renewed *its* lease with defendant after the first five-year term, the trial court had already concluded that plaintiff could only conjecture that Nextel would have also renewed its lease with him. Plaintiff did not challenge this ruling on appeal, and is bound by this finding in the current, second action. Because plaintiff's second action for damages is barred by res judicata, the authority in *Arnone* is inapposite.

Plaintiff further argues that summary disposition for defendant in this action was improper based on the doctrines of unjust enrichment and judicial estoppel, and furthermore, that plaintiff was entitled to summary disposition on the basis of collateral estoppel. Although

plaintiff raised these issues below, they were not addressed by the trial court, and therefore, are not preserved for appeal. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). "[T]his Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 640; 734 NW2d 217 (2007). Because we agree with the trial court that the matter in the second action is barred by res judicata, manifest injustice will not result by declining to consider plaintiff's remaining claims, which are all without merit.

Having concluded that the trial court correctly granted summary disposition in favor of defendant on the basis that plaintiff's action was barred by res judicata, we find it unnecessary to address defendant's cross-appeal on issues not addressed by the trial court.

Affirmed.

Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder